

Drafting Instructions for Transition from LRB-0135-P8 to First Draft of Bill
December 23, 2005

Please delete the following provisions from the current draft:

- ✓ 854.03[5][am]8. Please renumber current [5][am]9.
- ✓ 854.035
- ✓ 854.115

Note: These statutes were slated to be repealed and recreated to coordinate with 854.115, which has now been removed from the proposed legislation. Therefore the changes to these statutes should be removed:

- ✓ 863.16
- ✓ 863.19

Please add the following provisions to the final draft [details are attached]:
[some of these are new provisions; some are modifications of provisions already in the draft]

- 705.04[2]
- 705.06[1][c]
- 705.27
- 705.28[2m]
- 705.28[3]
- 853.25[2]
- 854.12
- 861.02[1][b] and [4]
- 861.20[2]

Please make the following changes to the applicability provision:

- ✓ Drop: reference to 854.115, 863.16, 863.19
- Treatments of 705.04[2], 705.06[1][c], and 705.27 are changed below.

Add:

Changes to sections 705.04[2], 705.06[1][c], 705.27, and 705.28 first apply to contracts entered into on _____. [Revisor: insert the date three months after effective date of this subsection.]

Note: The other changes in these instructions are "effective immediately" and not mentioned in the applicability section.

Thanks much!

Changes for 705.04[2] and 705.06[1][c] (marital accounts):

Draft P8 rennumbers and amends 705.04[2]. To the list created in this section, add:

(g) If the P.O.D. account is a marital P.O.D. account, the provisions of this section only apply to the 50% of the account not owned by the surviving spouse named as a party on the account.

Draft P8 amends 705.06[1][c]. At the end of the amended portion, add:

If the P.O.D. account is a marital P.O.D. account, this paragraph only applies to the 50% of the account not owned by the surviving spouse named as a party on the account.

Changes to 705.27 - .28. TOD Securities

Underlined changes are from draft of the Trailer Bill.

Additional changes are in bold.

705.27 Ownership on death of owner. Subject to the rights of the registering entity under 705.28(2m), on the death of a sole owner or the last to die of multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary's issue who would take under s. 854.06(3). On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the successors to the ownership interest. Until division of the security after the death of all owners, multiple successors to the ownership interest hold their interests as tenants in common. If no beneficiary or predeceased beneficiary's issue who would take under s. 854.06(3) survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of multiple owners.

705.28 (2m) If more than one beneficiary is named and at least one beneficiary is predeceased, a security registered in beneficiary form may be reregistered in the name of the surviving beneficiary or beneficiaries upon presentation of proof of death of the other beneficiary, without regard to claims by the issue of a predeceased beneficiary under s. 705.27 unless the registering entity receives written notice of such claim pursuant to s. 705.28(3)(b). If none of the named beneficiaries survive, a security registered in beneficiary form may be reregistered in the name of the estate of the deceased sole owner or the estate of the owner who was last to die of multiple owners, without regard to claims by the issue of a predeceased beneficiary under s. 705.27 unless the registering entity receives written notice of such claim pursuant to s. 705.28(3)(b).

705.28(3) (a) **Subject to sub. (b),** ~~☆~~ a registering entity is discharged from all claims to a security by the estate, creditors, heirs or devisees of the deceased owner if it registers a transfer of a security in accordance with s. 705.27 and does so in good faith reliance on the registration, on ss. 705.21 to 705.30, and on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity.

(b) The protections ~~of ss. 705.21 to 705.30~~ **provided in this Subchapter** do not extend to a reregistration or payment made after a registering entity has received written notice from a claimant to an interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under **this Subchapter ss. 705.21 to 705.30.** **If the registering entity has reason to believe that a dispute exists as to the rights of the parties to a security registered in beneficiary form or their successors, the registering entity may, but shall not be required to, refuse to reregister the security pending instructions from a court.**

Changes to Clarify Operation of 853.25 [2] –Children Omitted by Mistake.

853.25 Unintentional failure to provide for issue of testator. (1) Children born or adopted after making of the will.

(2) **Living issue omitted by mistake.** (a) Except as provided in sub. (5), if clear and convincing evidence proves that the testator failed to provide in the testator's will for a child living at the time of making of the will, or for the issue of any then deceased child, by mistake or accident, including the mistaken belief that the child or issue of a deceased child was dead at the time the will was executed, the child or issue is entitled to receive a share in the estate of the testator, ~~as provided under sub. (1);~~ as if the child or issue was born or adopted after the execution of the will, as follows:

1. If no children were included in the will but some or all of those children were omitted by mistake, then the share of any child or issue omitted by mistake is as provided under sub. (1)(b).

2. If some children were included in the will but other children were omitted by mistake, then the share of any child or issue omitted by mistake is as provided under sub. (1)(c).

(b) Failure to mention a child or issue in the will is not in itself evidence of mistake or accident.

854.12 Debt to transferor.

NOTE to reviewers: Since the whole statute is new, the bill will show the changes as clean text, not as strike out and underline.

854.12 Debt to transferor. (1) HEIR UNDER INTESTACY. (a) If an heir owes a debt to the decedent, the amount of the indebtedness shall be offset against the intestate share of the debtor heir.

(b) In contesting an offset under par. (a), the debtor heir shall have the benefit of any defense that would be available to the debtor heir in a direct proceeding by the personal representative for the recovery of the debt, except that the debtor heir may not defend on the basis that the debt was discharged in bankruptcy or on the basis that the relevant statute of limitations has expired. If the debtor fails to survive the decedent, the court may not include the debt in computing any intestate shares of the debtor's issue.

(2) TRANSFeree UNDER REVOCABLE GOVERNING INSTRUMENT. (a) Subject to par. (c), if a transferee under a revocable governing instrument survives the transferor and is indebted to the transferor, the amount of the indebtedness shall be treated as an offset against the property to which the debtor transferee is entitled. ~~The property not distributed to the debtor becomes part of the decedent's probate estate if it is not already.~~ If multiple revocable governing instruments transfer property to the debtor, the debt shall be equitably allocated against the various instruments.

(b) Subject to par. (c), in contesting an offset under par. (a), the debtor shall have the benefit of any defense that would be available to the transferee in a direct proceeding for the recovery of the debt, except that the transferee may not defend on the basis that the debt was discharged in bankruptcy, unless that discharge occurred before the execution of the governing instrument, or on the basis that the relevant statute of limitations has expired. If the transferee fails to survive the decedent, the debt may not be included in computing the entitlement of alternate beneficiaries.

(c) If the person who executed the governing instrument had an intent contrary to any provision in this subsection, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

(3) PROPERTY NOT DISTRIBUTED BECAUSE OF OFFSET. The property not distributed to the debtor becomes part of the residue of the entity that holds the debt. If the debt is not held by an entity, then the property not distributed to the debtor becomes part of the residue of the decedent's probate estate.

Changes to 861.02 Deferred marital property elective share.

(1)(b) The augmented deferred marital property estate is the total value of the deferred marital property of the spouses, irrespective of where the property was acquired, where the property was located at the time of a relevant transfer, or where the property is currently located, including real property located in another jurisdiction. It includes all types of property that fall within any of the following categories:

(4) Satisfaction. Satisfaction of the augmented deferred marital property elective share is governed by ss. 861.06, 861.07 and 861.11. These provisions apply irrespective of where the property was acquired, where the property was located at the time of a relevant transfer, or where the property is currently located, including real property located in another jurisdiction.

Change for 861.20 Surviving spouse's right in nondomiciliary decedent's real property in this state.

(2) If a married person who does not have a domicile in this state dies and has an interest in real property in this state that is subject to administration but not disposed of by will, the surviving spouse has the same right to the property under intestate succession as if the property were located in the decedent's domicile at decedent's death.

Committee Note

Clarifies that sub. (2) applies only to probate property. The provision is a "choice of law" provision, designating the intestacy law of the decedent spouse's domicile as the applicable law, rather than the law of Wisconsin. Sub. (2) has no bearing on the *nonprobate* transfer of real property located in Wisconsin. Note that sub. (2) only applies if the decedent was married; if real property owned by an unmarried non-domiciliary passes by intestacy, then ss. 852.01(1)(b)-(f) apply.

Notes to LRB 05-0135/P8 + subsequent changes
Amendments to the Wisconsin Probate Code

SUBJECT TO CONFIRMATION OF FINAL LANGUAGE, POST P8

Prepared for
State Bar of Wisconsin
Section on Real Property, Probate and Trusts
Probate Code "Trailer Bill" Drafting Committee*

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Committee Reporter

December 23, 2005

* The Drafting Committee is grateful for the assistance given the Committee by Atty. Elizabeth Heiner of Madison.

General Committee Note

Comments from nonlegislative committees can aid in interpreting legislative intent. *In re Estate of Haese and Czaicki v. Czaicki*, 73 Wis. 2d 9, 16, 242 N.W.2d 214 (1976).

An Act **to repeal** 854.03 (7), 854.06 (1) (b), 854.13 (7) (b), 854.13 (11) (title), 854.14 (1), 854.21 (1) (a) 1., 2. and 3., 861.04 (2), 861.21 (3), 861.31 (1c), 861.33 (1) (c) and 861.35 (1c); **to renumber** 701.06 (6), 701.115 (1), 766.62 (4), 853.32 (1), 854.13 (2) (a), 854.15 (5) (intro.) and 854.15 (5) (a), (b), (c), (d) and (e); **to renumber and amend** 701.26, 705.04 (2), 766.31 (3), 766.31 (6), 852.01 (1) (a) 2., 853.03 (2), 853.11 (2), 853.18 (1), 853.32 (2) (b), 854.01, 854.03 (5), 854.05 (5), 854.06 (4) (a), 854.06 (4) (b), 854.08 (5), 854.08 (6) (a) 1., 854.13 (10), 854.13 (11) (a), 854.13 (11) (b), 854.15 (1) (e), 854.15 (5) (f), 854.20 (1), 854.20 (2) (intro.), 854.20 (2) (a), 854.20 (2) (b), 854.20 (3), 854.20 (4), 854.21 (1) (a) (intro.), 857.03 (2) and 861.01 (3); **to consolidate, renumber and amend** 854.08 (6) (a) (intro.) and 2.; **to amend** 30.541 (3) (d) 2. d., 71.05 (6) (a) 16., 71.05 (6) (b) 12., 71.05 (12) (d), 101.9211 (4) (b) 4., 342.17 (4) (b) 4., 700.11 (1), 700.13 (2), 701.06 (7), 701.06 (8), 701.115 (2), 701.115 (3), 701.20 (5) (c), 701.24 (title) and (1), 701.26 (title), 702.03 (1), 702.08, 705.06 (1) (c), 705.06 (2), 705.27, 766.61 (7), 766.62 (2), 766.62 (5) (intro.), 767.266 (1) (b), 851.21 (1) (b), 851.31, 851.50, 852.01 (1) (b), 852.05 (title), 852.05 (1) (intro.), 852.05 (2), 852.05 (3), 852.12, 853.11 (3), 853.11 (6) (c), 853.11 (6) (d), 853.32 (2) (a), 854.03 (2) (b), 854.04 (1) (a), 854.04 (3) (a), 854.04 (4), 854.04 (5) (intro.), 854.04 (5) (b), 854.04 (6), 854.07 (3), 854.07 (4), 854.09 (3), 854.11 (4), 854.13 (title), 854.13 (2) (h), 854.13 (7) (title), 854.13 (7) (a), 854.13 (8), 854.13 (9), 854.13 (12) (b), 854.14 (5) (a), 854.14 (5) (b), 854.14 (5) (c), 854.17, 854.18 (1) (a) (intro.), 854.18 (3), 854.20 (5), 854.21 (1) (b), 854.21 (7), 854.22 (4), 856.05 (5), 856.15 (1), 856.17, 859.01, subchapter II (title) of chapter 861 [precedes 861.018], 861.02 (title), 861.02 (4), 861.02 (6), 861.02 (7) (b), 861.05 (1) (c), 861.05 (2) (title), 861.06 (title), 861.06 (2) (title), 861.06 (2) (b) (intro.), 861.06 (2) (b) 4. a., 861.07 (2) (intro.), 861.10 (1), 861.10 (2), 861.11 (2) (a) (intro.), 861.11 (2) (b), 861.11 (5) (b), 861.17 (3), 861.21 (1) (a), 861.21 (2), 861.21 (4), 861.21 (5), 861.31 (1m), 861.31 (2), 861.31 (4) (intro.), 861.31 (4) (a), 861.33 (title), 861.33 (1) (a) (intro.), 861.33 (1) (b), 861.33 (2), 861.33 (3), 861.33 (4), 861.35 (title), 861.35 (1m) (intro.), 861.35 (1m) (a), 861.35 (1m) (b), 861.35 (1m) (c), 861.35 (2), 861.35 (3) (a), 861.35 (4) (intro.), 861.35 (4) (a), 863.08, 863.15, 865.07 (1) (d), 867.01 (3) (am) 2., 867.02 (2) (am) 3., 867.03 (1g) (intro.), 867.03 (1g) (b), 867.03 (1m) (a), 867.03 (1m) (b), 867.03 (2), 867.035 (1) (a) 4., 867.045 (1) (intro.), 867.045 (2), 867.045 (4) and 879.09; **to repeal and recreate** 701.19 (10), 853.04 (3), 854.08 (5) (title), 854.13 (10) (title), 856.16, 861.02 (8), 863.16 and 863.19; **to create** 700.27, 701.06 (6) (b), (c) and (d), 701.115 (1) (a), 701.24 (3), 701.26 (1) (d), 701.26 (2), 705.04 (2) (a), 705.04 (2) (d), 705.04 (2) (e), 705.04 (2) (f), 766.31 (1) (title), 766.31 (2) (title), 766.31 (3) (b), 766.31 (4) (title), 766.31 (5) (title), 766.31 (6) (title), 766.31 (6) (b), 766.31 (7) (title), 766.31 (7p) (title), 766.31 (8) (title), 766.31 (9) (title), 766.31 (10) (title), 766.62 (4)

(b), 766.62 (4) (c), 851.055 (1m), 852.01 (1) (a) 2. b., 853.03 (2) (bm), 853.11 (2m), 853.18 (1) (a), (b) and (c), 853.32 (1) (bm), 853.32 (2) (am), 854.01 (1), 854.03 (5) (am) 7., 854.03 (5) (am) 8., 854.03 (5) (am) 9., 854.03 (5) (bm), 854.035, 854.06 (4) (a) 1., 854.08 (5) (a), 854.08 (5) (d), 854.115, 854.12, 854.13 (2) (a) 1., 854.13 (2) (gm), 854.13 (2) (i), 854.13 (7) (bm) and (c), 854.13 (10) (b), 854.14 (3m), 854.20 (2) (am) 2. b. and c., 857.03 (2m), 859.02 (2m), 861.01 (3m), 861.01 (4), 861.01 (5), 861.04 (2m), 861.05 (1) (e), 861.05 (2m), 861.06 (6), 867.03 (2g), 880.61 (11m) and 880.675 (1m) of the statutes; and **to affect** 1997 Wisconsin Act 188, section 233 (1); **relating to:** miscellaneous remedial modifications to the Wisconsin Probate Code.

Committee Note

See note to Section ____, Initial Applicability. It is significant that the “relating to” clause denotes the modifications to the Code as “remedial.”

Analysis by the Legislative Reference Bureau

This bill makes remedial modifications to current law and primarily corrects technical errors and clarifies various provisions in 1997 Wisconsin Act 188, which modernized the Wisconsin Probate Code. This bill continues the process of extending various interpretative rules from probate to nonprobate assets and of allowing extrinsic evidence to be used when interpreting the intent of the transferor, especially with respect to rules of construction. This bill also creates additional protections for a decedent spouse who is murdered by the surviving spouse.

Committee Note

See note to Section ____, Initial Applicability. It is significant that the Legislative Analysis denotes the modifications to the Code as “remedial.”

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

30.541 (3) (d) 2. d. of the statutes is amended to read:

30.541 (3) (d) 2. d. The limit in subd. 2. c. does not apply if the surviving spouse proceeds under s. 867.03 (1g) and the total value of the decedent's ~~solely owned~~ property subject to administration in the state, including boats transferred under this subdivision, does not exceed ~~\$20,000~~ \$50,000.

Committee Note

Clarifies that “solely owned property” refers to property subject to administration in the probate estate. For example, “solely owned property” includes the decedent’s half interest in marital property or an interest in a tenancy in common, but it does not include property that passes nonprobate, even if the decedent was the “sole owner” of that property during life.

The limit on the value of property that can be passed under this provision is increased to \$50,000 to reflect contemporary views of what constitutes a small estate.

71.05 (6) (a) 16. of the statutes is amended to read:

71.05 (6) (a) 16. Any amount recognized as a loss under section 1001 (c) of the ~~internal revenue code~~ Internal Revenue Code if a surviving spouse and a distributee exchange their interests in marital property under s. ~~857.03 (2)~~ 766.31 (3) (b).

Committee Note

Updates cross reference to reflect relocation and expansion of provisions under § 857.03(2). For an explanation of the provisions themselves, see Committee Note to 766.31(3)(b).

71.05 (6) (b) 12. of the statutes is amended to read:

71.05 (6) (b) 12. Any amount recognized as a gain under section 1001 (c) of the ~~internal revenue code~~ Internal Revenue Code if a surviving spouse and a distributee exchange their interests in marital property under s. ~~857.03 (2)~~ 766.31 (3) (b).

Committee Note

Updates cross reference to reflect relocation and expansion of provisions under § 857.03(2). For an explanation of the provisions themselves, see Committee Note to 766.31(3)(b).

71.05 (12) (d) of the statutes is amended to read:

71.05 (12) (d) Property exchanged under s. ~~857.03 (2)~~ 766.31 (3) (b) shall be treated as if acquired by gift for the determination of basis.

Committee Note

Updates cross reference to reflect relocation and expansion of provisions under § 857.03(2). For an explanation of the provisions themselves, see Committee Note to 766.31(3)(b).

101.9211 (4) (b) 4. of the statutes is amended to read:

101.9211 (4) (b) 4. The limit in subd. 3. does not apply if the surviving spouse is proceeding under s. 867.03 (1g) and the total value of the decedent's solely owned property subject to administration in the state, including the manufactured homes transferred under this paragraph, does not exceed ~~\$10,000~~ \$50,000.

Committee Note

Clarifies that "solely owned property" refers to property subject to administration in the probate estate. For example, "solely owned property" includes the decedent's half interest in marital property or an interest in a tenancy in common, but it does not include property that passes nonprobate, even if the decedent was the "sole owner" of that property during life.

The limit on the value of property that can be passed under this provision is increased to \$50,000 to reflect contemporary views of what constitutes a small estate.

342.17 (4) (b) 4. of the statutes is amended to read:

342.17 (4) (b) 4. The limit in subd. 3. does not apply if the surviving spouse is proceeding under s. 867.03 (1g) and the total value of the decedent's ~~solely owned~~ property subject to administration in the state, including the vehicles transferred under this paragraph, does not exceed ~~\$20,000~~ \$50,000.

Committee Note

Clarifies that “solely owned property” refers to property subject to administration in the probate estate. For example, “solely owned property” includes the decedent’s half interest in marital property or an interest in a tenancy in common, but it does not include property that passes nonprobate, even if the decedent was the “sole owner” of that property during life.

The limit on the value of property that can be passed under this provision is increased to \$50,000 to reflect contemporary views of what constitutes a small estate.

700.11 (1) of the statutes is amended to read:

700.11 (1) If a statute, inter vivos governing instrument, as defined in s. 700.27 (1)(c), or governing instrument, as defined in s. 854.01 (2), specifies that property is to be distributed to, or a future interest is to be created in, a designated individual’s “heirs²²,” “heirs at law²²,” “next of kin²²,” “relatives²² or²²,” “family²²,” or a term that has a similar meaning, or if a class gift in favor of “descendants²²,” “issue²²” or “heirs of the body” does not specify the manner in which the property is to be distributed among the class members, the property is distributed according to s. 854.22.

Committee Note

Creates cross reference to new statute dealing with disclaimer of lifetime transfers.

700.13 (2) of the statutes is amended to read:

700.13 (2) ~~Unless the instrument of transfer manifests a contrary intent,~~
The effect of a renunciation or release of an interest for life or years accelerates succeeding interests is as provided in ss. 700.27 (8) and 854.13 (10).

Committee Note

Repeals current rule regarding acceleration of subsequent interests when a prior interest is “renounced” or “released” and replaces it with a cross reference to a new rule applicable to disclaimed transfers. The new rule allows extrinsic evidence to be used in the construction of intent of an instrument of transfer, and also limits acceleration when the disclaimant holds both the prior and subsequent interests—for example, if a person holds an income interest in a trust until age 35 and then receives the remainder.

700.27 of the statutes is created to read:

700.27 Disclaimer of transfers during life. (1) DEFINITIONS. In this section:

(a) "Beneficiary under an inter vivos governing instrument" includes any person who receives or might receive property under the terms or legal effect of an inter vivos governing instrument.

(b) "Extrinsic evidence" has the meaning given in s. 854.01 (1).

(c) "Inter vivos governing instrument":

1. Means a gratuitous deed, inter vivos trust instrument, insurance policy, contract, inter vivos instrument that creates or exercises a power of appointment, or any other dispositive, appointive, or nominative instrument that transfers property other than a governing instrument as defined in s. 854.01 (2).

2. Includes an inter vivos gift that is not subject to a written instrument.

(d) "Power" has the meaning given in s. 702.01 (4).

(2) RIGHT TO DISCLAIM. (a) *In general.* 1. In this paragraph, "person" includes a person who is unborn or whose identity is unascertained.

2. A person who is a recipient of property or beneficiary under an inter vivos governing instrument, donee of a power created by an inter vivos governing instrument, appointee under a power exercised by an inter vivos governing instrument, taker in default under a power created by an inter vivos governing instrument, or person succeeding to disclaimed property created by an inter vivos governing instrument may disclaim any property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) *Partial disclaimer.* Property transferred under an inter vivos governing instrument may be disclaimed in whole or in part, except that a partial disclaimer of property passing by an inter vivos governing instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the inter vivos governing instrument or by the instrument exercising the power.

(c) *Spendthrift provision.* The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(d) *Disclaimer by a guardian or conservator.* A guardian of the estate or a conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

(e) *Disclaimer by an agent under power of attorney.* An agent under a power of attorney may disclaim on behalf of the person who granted the power of attorney if all of the following apply:

1. The person who granted the power of attorney is entitled to disclaim under this section.

2. The power of attorney specifically grants the power to disclaim.

(f) *Disclaimer by trustee.* The trustee of a trust named as a recipient of property under an inter vivos governing instrument may disclaim that property on behalf of the trust if the trust authorizes disclaimer by the trustee. If the trust does not authorize disclaimer by the trustee, the trustee's power to disclaim is subject to the approval of the court.

(g) *After death.* A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action that would bar the right to disclaim under sub. (9).

(h) *Disclaimers of transfers at death.* A person who is a recipient of property under a governing instrument, as defined in s. 854.01 (2), may disclaim the property as provided in s. 854.13.

(3) **INSTRUMENT OF DISCLAIMER.** The instrument of disclaimer must meet the provisions of subs. (4) and (5) and s. 854.13 (3) (a) to (c).

(4) **TIME FOR EFFECTIVE DISCLAIMER.** (a) *Present interest.* An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the transfer under the inter vivos governing instrument. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(b) *Future interest.* An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property is finally ascertained and his or her interest indefeasibly fixed. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive mandatory distributions of income or profits from any source may be executed and delivered at any time.

(d) *Persons under 21.* Notwithstanding pars. (a) and (b), a person under 21 years of age may disclaim at any time not later than 9 months after the date on which the person attains 21 years of age.

(e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person whose interest in property arises by disclaimer or by default of exercise of a power created by an inter vivos governing instrument may disclaim at any time not later than 9 months after the day on which the prior instrument of disclaimer is delivered, or the date on which the donee's power lapses.

(5) DELIVERY AND FILING OF DISCLAIMER. (a) *Delivery.* In addition to any requirements imposed by the inter vivos governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property disclaimed.
2. The transferor's legal representative.
3. The holder of legal title to the property.

(b) *Delivery to trustee.* If the trustee of any trust to which the interest or power relates does not receive the instrument of disclaimer under par. (a), a copy shall also be delivered to the trustee. Failure to deliver a copy of the instrument of disclaimer to the trustee within the time specified under sub. (4) does not affect the validity of any disclaimer.

(c) *Recording.* If real property or an interest in real property is disclaimed, a copy of the instrument of disclaimer may be recorded in the office of the register of deeds of the county in which the real estate is situated.

(6) PROPERTY NOT VESTED. The property disclaimed under this section shall be considered not to have been vested in, created in, or transferred to the disclaimant.

(7) DEVOLUTION. (a) *In general.* Subject to sub. (8), unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the effective date of the transfer under the inter vivos governing instrument. If the disclaimed interest is a remainder contingent on surviving to the time of distribution, the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. If the disclaimant is an appointee under a power exercised by an inter vivos governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by an inter vivos governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power.

(b) Devolution to issue of the disclaimants. Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, if, by law or under the inter vivos governing instrument, the issue of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time the disclaimed interest

would have taken effect in possession or enjoyment, the disclaimed interest passes only to the issue of the disclaimant who survive when the disclaimed interest takes effect in possession or enjoyment.

(c) Disclaimer of a devisable future interest. 1. In this paragraph, "devisable future interest" is a future interest that can be passed under the will of the person who holds the future interest.

2. If the disclaimed interest is a devisable future interest under the law governing the transfer, then the disclaimed interest devolves as if it were a nondevisable future interest.

(8) ACCELERATION OF SUBSEQUENT INTERESTS WHEN PRECEDING INTEREST IS DISCLAIMED. (a) *Subsequent interest not held by disclaimant.* Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed accelerates to take effect as if the disclaimant had died immediately before the time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power exercised by a power of appointment, as if the disclaimant had died before the effective date of the exercise of the power.

(b) *Subsequent interest held by disclaimant.* Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest held by the disclaimant does not accelerate.

(9) BAR. Actions that bar disclaimer are as provided in s. 854.13 (11g).

(10) EFFECT OF DISCLAIMER OR WAIVER. The effect of the disclaimer on the disclaimant and any successors in interest is as provided in s. 854.13 (11p).

(11) NONEXCLUSIVENESS OF REMEDY. (a) This section does not affect the right of a person to waive, release, disclaim, or renounce property under any other statute or the common law, or as provided in the creating instrument.

(b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under this section or s. 854.13.

(12) CONSTRUCTION OF EFFECTIVE DATE. In this section, the effective date of a transfer under an inter vivos governing instrument is the date on which the transfer is a completed gift for federal gift tax purposes.

Committee Note

Codifies the right to disclaim a lifetime transfer. In general the statute parallels the provisions for disclaimer at death, in § 854.13. Note that in order to keep

the language in § 700.27 from being overly cumbersome, the definition of “inter vivos governing instrument” in § 700.27(1)(c) includes an inter vivos gift that is *not* subject to a written instrument.

701.06 (6) of the statutes is renumbered 701.06 (6) (a).

701.06 (6) (b), (c) and (d) of the statutes are created to read:

701.06 (6) (b) A beneficiary of a trust may not be considered a settlor solely because of a lapse, waiver, or release of any of the following:

1. A power described under par. (c).
2. The beneficiary’s right to withdraw part of the trust property, to the extent that the value of the property affected by the lapse, waiver, or release in any year does not exceed the greater of the amount in:
 - a. Section 2041 (b) (2) or 2514 (e), Internal Revenue Code of 1986.
 - b. Section 2503 (b), Internal Revenue Code of 1986.

(c) A beneficiary of a trust is not a settlor, has not made a voluntary or involuntary transfer of the beneficiary’s interest in the trust, or does not have the power to make a voluntary or involuntary transfer of the beneficiary’s interest in the trust solely because the beneficiary holds or exercises, in any capacity, any of the following:

1. A presently exercisable power to consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary if the power is any of the following:
 - a. Exercisable only on consent of another person holding an interest adverse to the beneficiary’s interest.
 - b. Limited by an ascertainable standard, such as health, education, support, or maintenance of the beneficiary.
 2. A presently exercisable power to appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary’s estate, or a creditor of the beneficiary’s estate.
 3. A testamentary power of appointment.
 4. A presently exercisable right described in par. (b) 2.
- (d) A beneficiary of a trust is not a settlor solely because the beneficiary is entitled to nondiscretionary distributions from the trust.

Committee Note

Amendments clarify existing law to assure that spendthrift trusts do not lose spendthrift protection merely because (1) a beneficiary has allowed a limited power of withdrawal or power of appointment to lapse, (2) the beneficiary, in his or her capacity as beneficiary or as trustee, has certain powers over the property in the trust, so long as the authority is limited or is only exercisable at death, or (3) the beneficiary has the right to nondiscretionary distributions from the trust.

The changes, which state that a beneficiary will not be considered to be a settlor of the trust in the situations listed, are modeled on proposed changes to Texas § 112.035 and are in response to an interpretation in Section 60 of the Restatement, Third, of Trusts, which calls into question the protection from creditors of a spendthrift trust when the trustee also is a beneficiary of the trust, even if the trustee's authority to make distributions is limited to an ascertainable standard.

Under new § 701.24(2), the amendments to § 701.06(6) apply retroactively to irrevocable trusts, except to the extent that retroactive application would be unconstitutional. Retroactive application is appropriate because the amendments to § 701.06(6) merely clarify existing law.

701.06 (7) of the statutes is amended to read:

701.06 (7) SUBSEQUENT MODIFICATION OF COURT'S ORDER. Any order entered by a court under sub. (4), (5) or (6) (a) is subject to modification upon application of an interested person.

Committee Note:

Amends cross reference.

701.06 (8) of the statutes is amended to read:

701.06 (8) EXEMPT ASSETS. Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to sub. (4), (5), or (6) (a).

Committee Note:

Amends cross-reference.

701.115 (1) of the statutes is renumbered 701.115 (1) (b).

701.115 (1) (a) of the statutes is created to read:

701.115 (1) (a) In par. (b), “revocable trust” means a trust that the grantor, at the time of death, was alone empowered to change or revoke, by law or under the instrument creating the trust, regardless of whether the grantor then had the capacity to exercise the power.

Committee Note

Provides a definition of revocable trust parallel to the definition in new § 854.01(3). Clarifies that a grantor’s lack of capacity to exercise his or her power to revoke a trust does not render the trust irrevocable.

701.115 (2) of the statutes is amended to read:

701.115 (2) Survivorship under sub. (1) (b) is governed by s. 854.03.

Committee Note

Amends cross reference.

701.115 (3) of the statutes is amended to read:

701.115 (3) The rights of the issue of a predeceasing beneficiary under sub. (1) (b) are governed by s. 854.06.

Committee Note

Amends cross reference.

701.19 (10) of the statutes is repealed and recreated to read:

Restriction on exercise of powers. (a) Except as provided in par. (c), a person may not exercise any of the following powers conferred upon him or her in his or her capacity as trustee:

1. The power to make discretionary distributions of trust principal or income if the distributions are to himself or herself or for the discharge of his or her legal obligations.

2. The power to make discretionary allocations of receipts or expenses as between principal and income if the allocations are in his or her favor.

(b) If a power under par. (a) is conferred upon more than one person as trustee, a person who is not disqualified to act under par. (a) may exercise the power for the benefit of the person who is disqualified to act, unless the creating instrument expressly provides otherwise. A special trustee appointed by a court may exercise a power under par. (a) for the benefit of the disqualified person if no other trustee is qualified to exercise the power.

(c) Paragraph (a) does not apply if any of the following applies:

1. The person is also the settlor of the trust, and the trust may be revoked or amended by the settlor.

2. The terms of the creating instrument specifically limit the scope of the power to expenditures and distributions of income or principal on the basis of an ascertainable standard relating to the person's health, maintenance, support, or education such that the person would not be subject to tax under section 2041 or 2514 of the Internal Revenue Code as a result of having or exercising the power.

3. The person is the spouse, widow, or widower of the settlor of the trust, and a marital deduction has been allowed for federal gift or estate tax purposes with respect to the trust property that is subject to the power.

4. The creating instrument negates the application of par. (a) with respect to the power or indicates that provisions that are similar to par. (a) do not apply.

(d) Section 701.24 (3) governs the applicability of this statute.

Committee Note

Current § 701.19(10) casts too broad a net, banning all discretionary power of a trustee to distribute to himself or herself, irrespective of whether an adverse tax situation would result from having or exercising the power. The new statute takes a more fine-tuned approach, functioning much like a savings clause in an estate plan. The statute is patterned after § 45a-487 of the Connecticut Statutes. The Drafting Committee believes that the existence of the powers in the revised statute will not have adverse tax consequences under §§ 2041 or 2514 (general power of appointment) of the Internal Revenue Code.

New § 701.24(3) provides that new § 701.19(10) applies retroactively to irrevocable trusts, except to the extent that retroactive application would be unconstitutional. Retroactive application is appropriate because § 701.19(10) does not create any new right. Instead, it removes the prohibition on the exercise of a power delineated in the trust instrument.

701.20 (5) (c) of the statutes, as affected by 2005 Wisconsin Act 10, is amended to read:

701.20 (5) (c) A fiduciary shall distribute to a beneficiary, including a trustee, who receives a pecuniary amount not determined by a pecuniary formula interest at the legal rate set forth in s. 138.04 on any unpaid portion of the pecuniary amount for the period commencing one year after the decedent's death or after the income interest in the trust ends. The interest under this paragraph shall be distributed from net income determined under par. (b) or from principal to the extent that net income is insufficient. For purposes of this paragraph, the deferred marital property elective share amount elected by a surviving spouse under s. 861.02 (1) is a bequest of a specific amount of money not determined by a pecuniary formula.

Committee Note

Because of the shift in the deferred marital property election from a direct property interest to an elective share amount, 1997 Act 188 removed a sentence from § 701.20 (5)(b) that stated that property received under the election would be treated like a specific bequest. The amendment adds an analogous provision to § 701.20 (5)(c), providing that the elective share amount will be treated like a bequest of a specific amount of money.

701.24 (title) and (1) of the statutes, as affected by 2005 Wisconsin Act 10, are amended to read:

701.24 (title) Applicability of ss. ~~701.01 to 701.23~~. (1) Except as otherwise provided in sub. (3) and s. 701.19 (9) (a) ~~and (10)~~, ss. 701.01 to 701.19, 701.21, 701.22, and 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust created after such date, and shall govern trustees acting under such trusts. If application of any provision of ss. 701.01 to 701.19, 701.21, 701.22, and 701.23 to a trust in existence on August 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust created after that date.

701.24 (3) of the statutes is created to read:

701.24 (3) Sections 701.06 (6) (b), (c), and (d) and 701.19 (10) are applicable to a trust existing on the effective date of this subsection [revisor inserts date], as well as a trust created after that date, and shall govern trustees acting under such trusts. If application of any provision of s. 701.06 (6) (b), (c), or (d) or 701.19 (10) to a trust in existence on the effective date of this subsection [revisor inserts date], is

unconstitutional, it shall not affect application of the provision to a trust created after that date.

Committee Note

Provides that new § 701.19(10) and the new provisions in § 701.06(6) apply retroactively to irrevocable trusts, except to the extent that retroactive application would be unconstitutional. Retroactive application of the new provisions in § 701.06(6) is appropriate because the amendments merely clarify existing law. Retroactive application of § 701.19(10) is appropriate because § 701.19(10) does not create any new right. Instead, it lifts the prohibition on the exercise of a power delineated in the trust instrument.

701.26 (title) of the statutes is amended to read:

701.26 (title) Disclaimers of nonprobate transfers ~~at death~~.

701.26 of the statutes is renumbered 701.26 (1) and amended to read:

701.26 (1) A person recipient may disclaim, under s. 854.13, any of the following:

(a) ~~An~~ All or part of an interest in a joint tenancy, upon the death of another joint tenant.

(b) ~~An~~ All or part of an interest in survivorship marital property, upon the death of the other spouse.

(c) ~~An~~ All or part of an interest that is created by a nontestamentary instrument and transferred at death, upon the death that causes the transfer.

701.26 (1) (d) of the statutes is created to read:

701.26 (1) (d) All or part of any other interest transferred under a governing instrument, as defined in s. 854.01 (2).

701.26 (2) of the statutes is created to read:

701.26 (2) A recipient may disclaim, under s. 700.27, all or part of any interest transferred under an inter vivos governing instrument, as defined in s. 700.27 (1) (c)).

Committee Note

Provides editorial changes and additional cross references, including cross reference to new statute that codifies the right to disclaim a lifetime gift.

702.03 (1) of the statutes is amended to read:

702.03 (1) Unless the person who executed it had a contrary intention ~~is found~~, if a governing instrument, as defined in s. 854.01, ~~creating (2), or an inter vivos governing instrument, as defined in s. 700.27 (1) (c), creates~~ a power of appointment that expressly requires that the power be exercised by any type

of reference to the power or its source, ~~it is presumed that~~ the donor's intention in requiring the reference ~~was~~ is presumed to be to prevent an inadvertent exercise of the power. Extrinsic evidence, as defined in s. 854.01(1), may be used to ~~show contrary~~ construe the intent.

Committee Note

Clarifies language and extends statute to cover powers of appointment created in inter vivos instruments.

702.08 of the statutes is amended to read:

702.08 Disclaimer of powers. The donee of any power may disclaim all or part of the power as provided under s. 700.27 or 854.13.

Committee Note

Creates cross reference to new statute that codifies the right to disclaim a lifetime gift.

705.04 (2) of the statutes is renumbered 705.04 (2) (intro.) and amended to read:

705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original payee or the survivor of 2 or more original payees, ~~any sums remaining on deposit belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more die before the original payee. Payment may be made to a minor P.O.D. beneficiary, however, only in accordance with a procedure approved in ch. 880: all of the following apply:~~

(b) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall be ~~are~~ entitled to payment of the sums on deposit in accordance with such ~~any~~ written instructions as may have been that the owner filed with the financial institution; and or, if none the owner left no written instructions, to payment in equal shares. ~~There~~

(c) If 2 or more persons succeed to ownership of the account, there is no further right of survivorship in the event of the death of one of 2 or more P.O.D. beneficiaries after their entitlement to payment has matured unless the terms of the account expressly provide for survivorship or for the account's continuance as a joint account.

705.04 (2) (a) of the statutes is created to read:

705.04 (2) (a) If there is one P.O.D. beneficiary and he or she survives, he or she is entitled to payment of all sums remaining on deposit.

705.04 (2) (d) of the statutes is created to read:

705.04 (2) (d) Subject to the rights of financial institutions under s. 705.06 (1) (c), if any P.O.D. beneficiary predeceases the original payee or the

survivor of 2 or more original payees, the amount to which the predeceased P.O.D. beneficiary would have been entitled passes to any of his or her issue who would take under s. 854.06 (3).

705.04 (2) (e) of the statutes is created to read:

705.04 (2) (e) If no P.O.D. beneficiary or predeceased P.O.D. beneficiary's issue who would take under s. 854.06 (3) survives the death of all owners, the account belongs to the estate of the deceased sole owner or the estate of the last to die of multiple owners.

705.04 (2) (f) of the statutes is created to read:

705.04 (2) (f) Payment may be made to a minor P.O.D. beneficiary only in accordance with a procedure approved under ch. 880.

____-- Requested post P8 -- (g) If the P.O.D. account is a marital P.O.D. account, the provisions of this section only apply to the 50% of the account not owned by the surviving spouse named as a party on the account.

Committee Note

Clarifies the determination of beneficiaries under P.O.D. accounts, and coordinates § 705.04 with the general "anti-lapse" provisions of § 854.06. Note that § 854.06 is countermanded when there is evidence of contrary intent, which includes but is not limited to "such written instructions as may have been filed with the financial institution." The reference to the rights of financial institutions under § 705.06(1)(c) clarifies that financial institutions can pay to the named beneficiaries. Consequently, the rights of the issue of a predeceased beneficiary under § 854.06 are against the other beneficiaries, not against the financial institution holding the account.

-- Requested post P8 -- As provided in s. ____ of the bill, the effective date of the amendments to sub. (2) is delayed until three months after the effective date of the legislation, in order to give financial institutions sufficient time to revise their forms to accommodate the new "antilapse" provision of par.(2)(d). However, some of the provisions simply clarify or restate current law, which remains in effect. For example, par. (g) restates current s. 705.02(1)(e).

705.06 (1) (c) of the statutes is amended to read:

705.06 (1) (c) Any sums in a P.O.D. account may be paid, on request, to the P.O.D. beneficiary upon presentation to the financial institution of proof of death showing that the P.O.D. beneficiary survived all persons named as original payees of the account. If more than one P.O.D. beneficiary is named and at least one of them is predeceased, sums in the account may be paid to the

surviving P.O.D. beneficiary or beneficiaries upon presentation of proof of death of the other beneficiary, without regard to claims by the issue of a predeceased beneficiary under s. 705.04 (2) (d). If none of the named beneficiaries survive, the sums in the account may be paid to the estate of the deceased sole owner or the estate of the owner who was the last to die of multiple owners, without regard to claims by the issue of a predeceased beneficiary under s. 705.04 (2) (d). -- Requested post P8 – If the P.O.D. account is a marital P.O.D. account, this paragraph only applies to the 50% of the account not owned by the surviving spouse named as a party on the account.

Committee Note

Implements changes discussed in Committee Note to § 705.04(2).

In a marital account with POD beneficiaries, upon the death of a spouse, if none of the named beneficiaries survive, the sums in the account may be paid 50% to the estate of the first spouse to die and 50% to the surviving spouse, without regard to claims by the issue of a predeceased beneficiary under s. 705.04(2)(d). If the surviving spouse does not survive until payment, his or her 50% interest may be paid to his or her estate.

-- Requested post P8 – As provided in s. ____ of the bill, the effective date of these provisions is delayed until three months after the effective date of the legislation, in order to coordinate with the delayed effective date of the amendments to s. 705.04(2).

705.06 (2) of the statutes is amended to read:

705.06 (2) Payment made under this subchapter discharges the financial institution from all claims for amounts so withdrawn. If the institution has reason to believe that a dispute exists as to the rights of the parties to an account or their successors it may, but shall not be required to, refuse to pay funds in the account to any persons pending instructions from a court, or it may pay the proceeds to a court. An institution may but need not recognize the authority of an agent, other than one with continuing authority under s. 705.05 (3), until it knows of the fact of death or adjudication of incompetence of all parties appointing such agent and has reasonable opportunity to act.

(3) The protection provided by this section shall have no bearing on the rights of parties or their successors in disputes concerning the beneficial ownership of funds in or withdrawn from an account.

Committee Note

Clarifies that if a financial institution is aware of a dispute about ownership of an account, the financial institution may choose to hold the funds pending instructions from a court or may pay the funds to a court. (Alternatively, the

financial institution may pay to the named party and will not be held liable if another party is deemed to be the rightful owner. In that instance, the rightful owner may proceed against the party who received the funds from the account.)

Renumbered sub. (3) is separated from sub. (2) in order to highlight it. Sub. (2) provides certain protections for the financial institution. Renumbered sub. (3) provides protection for a different class—the owners and beneficiaries of an account.

As provided in s. [Initial Applicability] of the bill, this provision is effective for persons who die on or after the effective date of the legislation.

705.27 of the statutes is amended to read:

705.27 Ownership on death of owner. On death of a sole owner or the last to die of multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the ~~beneficiary or beneficiaries who survive the death of all owners~~ successors to the ownership interest. Until division of the security after the death of all owners, multiple ~~beneficiaries surviving the death of all owners~~ successors to the ownership interest hold their interests as tenants in common. If no beneficiary or predeceased beneficiary's issue who would take under s. 854.06 (3) survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of multiple owners.

-- Requested post P8 – **705.27 Ownership on death of owner.** Subject to the rights of the registering entity under 705.28(2m), on the death of a sole owner or the last to die of multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary's issue who would take under s. 854.06(3). On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the successors to the ownership interest. Until division of the security after the death of all owners, multiple successors to the ownership interest hold their interests as tenants in common. If no beneficiary or predeceased beneficiary's issue who would take under s. 854.06(3) survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of multiple owners.

Committee Note

Coordinates this section with the general “anti-lapse” provisions of § 854.06. Note that § 854.06 is countermanded when there is evidence of contrary intent, which includes but is not limited to written instructions filed with the financial institution.

-- Requested post P8 – Creates cross reference to provisions for protection of financial institutions. As provided in s. ____ of the bill, the effective date of the amendments to this section is delayed until three months after the effective date of the legislation, in order to give financial institutions sufficient time to revise their forms to accommodate the new “antilapse” provision.

-- Requested post P8 – 705.28 (2m) If more than one beneficiary is named and at least one beneficiary is predeceased, a security registered in beneficiary form may be reregistered in the name of the surviving beneficiary or beneficiaries upon presentation of proof of death of the other beneficiary, without regard to claims by the issue of a predeceased beneficiary under s. 705.27 unless the registering entity receives written notice of such claim pursuant to s. 705.28(3)(b). If none of the named beneficiaries survive, a security registered in beneficiary form may be reregistered in the name of the estate of the deceased sole owner or the estate of the owner who was last to die of multiple owners, without regard to claims by the issue of a predeceased beneficiary under s. 705.27 unless the registering entity receives written notice of such claim pursuant to s. 705.28(3)(b).

Committee Note:

-- Requested post P8 – Clarifies protection of financial institutions. As provided in s. ____ of the bill, the effective date of this provision is delayed until three months after the effective date of the legislation, to coordinate with the delayed effective date of the amendments to s. 705.27.

-- Requested post P8 – 705.28(3) (a) **Subject to sub. (b), A** a registering entity is discharged from all claims to a security by the estate, creditors, heirs or devisees of the deceased owner if it registers a transfer of a security in accordance with s. 705.27 and does so in good faith reliance on the registration, on ss. 705.21 to 705.30, and on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity.

(b) The protections ~~of ss. 705.21 to 705.30~~ **provided in this Subchapter** do not extend to a reregistration or payment made after a registering entity has received written notice from a claimant to an interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under **this Subchapter ss. 705.21 to 705.30. If the registering entity has reason to believe that a dispute exists as to the**

rights of the parties to a security registered in beneficiary form or their successors, the registering entity may, but shall not be required to, refuse to reregister the security pending instructions from a court.

Committee Note:

Clarifies protection of financial institutions. As provided in s. ____ of the bill, the effective of the amendments to this section is delayed until three months after the effective date of the legislation, to coordinate with the delayed effective date of the amendments to s. 705.27.

766.31 (1) (title) of the statutes is created to read:
766.31 (1) (title) GENERAL.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (2) (title) of the statutes is created to read:
766.31 (2) (title) PRESUMPTION.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (3) of the statutes is renumbered 766.31 (3) (intro.) and amended to read:

766.31 (3) **SPOUSE'S INTEREST IN MARITAL PROPERTY.** (intro.) Each spouse has a present undivided one-half interest in each item of marital property, ~~but the~~ subject to all of the following:

(a) Terminable interest in deferred employment benefit plan. As provided in s. 766.62 (5), the marital property interest of the nonemployee spouse in a deferred employment benefit plan or in assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employee spouse.

Committee Note

Clarifies that the provision in § 766.31(3) regarding certain deferred employment plans and IRAs is the same as contained in § 766.62(5). Adds title and subtitle, to clarify content of subsection.

766.31 (3) (b) of the statutes is created to read:

766.31 (3) (b) *Division based on aggregate value at death.* 1. Spouses may provide in a marital property agreement that at the death of a spouse some or all of their marital property will be divided based on aggregate value rather than divided item by item. However, at the death of a spouse, a marital property agreement is not necessary for a division of marital property that is not item by item.

2. The surviving spouse and the successor in interest to the decedent's share of marital property may enter into an agreement providing that some or all of the marital property in which each has an interest will be divided based on aggregate value rather than divided item by item.

Committee Note

Provides that at death, marital property can be divided based on aggregate value rather than item by item. This division may be agreed to during life (via a marital property agreement) or after one spouse has died (via an agreement between the surviving spouse and the decedent's successor in interest). In the situation where the surviving spouse dies before the estate of the first spouse to die can be resolved, the Drafting Committee intends § 766.31(3)(b)2 to allow the surviving spouse's successor in interest to make an agreement with the successor in interest to the share of marital property owned by the first spouse to die. This provision is modeled on § 100 of the California Probate Code.

Note that current § 857.03, which provides for division of marital property on an aggregate basis pursuant to a court-approved exchange, has been moved to this section as § 766.31(3)(b)3. Due to drafting conventions, the bill treats this as a change to § 857.03, not as a change to Chapter 766. For this reason, the content of current § 857.03 is not shown in the bill.

766.31 (4) (title) of the statutes is created to read:

766.31 (4) (title) CLASSIFICATION OF INCOME.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (5) (title) of the statutes is created to read:

766.31 (5) (title) TRANSFER TO A TRUST.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (6) (title) of the statutes is created to read:

766.31 (6) (title) PROPERTY OWNED AT DETERMINATION DATE.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (6) of the statutes is renumbered 766.31 (6) (a) and amended to read:

766.31 (6) (a) *Date of marriage same as determination date.*
~~Property owned at a~~ If the date of marriage which occurs after 12:01 a.m. on January 1, 1986, is the same as the determination date, the property owned at the determination date is individual property of the owning spouse ~~if, at the marriage, both spouses are domiciled in this state.~~

766.31 (6) (b) of the statutes is created to read:

766.31 (6) (b) *Date of marriage prior to determination date.* If the date of marriage precedes the determination date, the property owned at the determination date is not classified by this chapter but is subject to all of the following:

1. Subsections (8) and (9) govern property owned at the time of marriage.
2. Subsections (8) and (9) govern property acquired while the spouses were married but before the determination date if the property would have been individual property had it been acquired after the determination date.
3. Subsections (8) and (9) and s. 861.02 govern property acquired while the spouses were married but before the determination date if the property would have been marital property had it been acquired after the determination date.

Committee Note

Clarifies the status of property owned on the determination date, depending on whether the date of marriage is the same as the determination date. Creates cross references to §§ 766.31(8) and (9) and 861.02 (deferred marital property elective share) to show the treatment of property that is unclassified by the Marital Property Act because it was acquired during a period where the spouses were married but the Marital Property Act did not apply.

Note that “during marriage” is a defined term under § 766.01(8). For this reason, the more awkward phrase “while the spouses were married” is used in the statute.

766.31 (7) (title) of the statutes is created to read:

766.31 (7) (title) INDIVIDUAL PROPERTY AFTER DETERMINATION
DATE.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31(7m) [PERSONAL INJURY DAMAGES; LOST EARNINGS.]

Committee Note for new 766.31(7m)

Section 861.01(3) is renumbered § 766.31(7m) in order to locate it with the other classification rules. The relocated statute is also amended to read:

766.31 (7m) PERSONAL INJURY DAMAGES; LOST EARNINGS. To the extent that marital property includes damages for loss of future income arising from a personal injury claim of ~~the~~ a surviving spouse, the surviving spouse is entitled to receive as individual property that portion of the award that represents an income substitute after the death of the other spouse.

Due to drafting conventions, the bill treats the relocation and amendment as a change to § 861.03(3), not as a change to Chapter 766. For this reason, the change is not shown at this point in the bill.

766.31 (7p) (title) of the statutes is created to read:

766.31 (7p) (title) UNILATERAL STATEMENT.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (8) (title) of the statutes is created to read:

766.31 (8) (title) RIGHTS IN PROPERTY ACQUIRED BEFORE
DETERMINATION DATE.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (9) (title) of the statutes is created to read:

766.31 (9) (title) TREATMENT OF PROPERTY ACQUIRED BEFORE THE DETERMINATION DATE.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.31 (10) (title) of the statutes is created to read:

766.31 (10) (title) RECLASSIFICATION.

Committee Note:

Adds title to subsection, to clarify content of § 766.31.

766.61 (7) of the statutes is amended to read:

766.61 (7) ~~If~~ Except as provided in s. 854.14 (3m) (b) 2., if a noninsured spouse predeceases an insured spouse, the decedent spouse's marital property interest ~~of the decedent spouse~~ in a policy ~~which~~ that designates the surviving spouse as the owner and insured is limited to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the decedent spouse's date of death ~~of the deceased spouse~~. All other rights of the decedent spouse in the ownership interest or proceeds of the policy, other than the marital property interest described in this subsection, terminate at the decedent spouse's death.

Committee Note

Creates cross reference to new § 854.14(3m)(b)2, which provides a different rule when the noninsured spouse predeceased because he or she was unlawfully and intentionally killed by the insured spouse. Also includes nonsubstantive edits.

The “interpolated terminal reserve” is roughly equivalent to the value that the owner would receive if the policy were terminated.

766.62 (2) of the statutes is amended to read:

766.62 (2) A deferred employment benefit attributable to employment of a spouse occurring ~~while the spouse is married and~~ partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the amount which results from multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of employment giving rise to the benefit.

Committee Note

Clarifies the “pro-rata by time” rule for classification of deferred employment benefit plans that straddle the determination date. The rule considers the period of employment during which the Marital Property Act applied to the marriage, compared to the total period of employment giving rise to the benefit, irrespective of whether the employment took place while the spouses were married. For example, assume that Spouse A had a plan that started 1-1-76 and that the spouses’ determination date is 1-1-86. On 1-1-96, the plan is 50% marital property, irrespective of whether the spouses were married during 1976-1985.

766.62 (4) of the statutes is renumbered 766.62 (4) (a).

766.62 (4) (b) of the statutes is created to read:

766.62 (4) (b) If a deferred employment benefit plan administrator has reason to believe that a dispute exists as to the rights of parties, or their successors, to a deferred employment benefit, the deferred employment benefit plan administrator may do any of the following:

1. Deposit the benefit funds with a court having jurisdiction of the proceedings. The court shall hold the funds and, upon determination of the owner, shall order disbursement in accordance with the determination. Property deposited with the court discharges the deferred employment benefit plan administrator from all claims for the benefit funds.

2. Refuse to transfer any funds from the plan to any person until the administrator receives from a court written documentation that the dispute has been resolved.

3. Make a payment under par. (a).

766.62 (4) (c) of the statutes is created to read:

766.62 (4) (c) The protection afforded a deferred employment benefit plan administrator under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of deferred employment benefits.

Committee Note

Creates provisions analogous to those in other parts of the statutes (e.g., § 854.23(5)(c)), expanding the options available to the deferred employment benefit plan administrator when there is a dispute regarding benefits. The administrator is not required to use any of the new options and can simply pay the benefits in accordance with the plan and the administrator's records, pursuant to renumbered § 766.62(4)(a). Note that the protections afforded the administrator under this subsection do not impair the rights of the parties to the dispute.

766.62 (5) (intro.) of the statutes is amended to read:

766.62 (5) (intro.) If Except as provided in s. 854.14 (3m) (c), if the nonemployee spouse predeceases the employee spouse, the marital property interest of the nonemployee spouse in all of the following terminates at the death of the nonemployee spouse:

Committee Note

Creates cross reference to new § 854.14(3m)(c), which provides a different rule for ownership of deferred employee benefit plans and certain IRAs when the nonemployee spouse predeceased because he or she was unlawfully and intentionally killed by the employed spouse.

767.266 (1) (b) of the statutes is amended to read:

767.266 (1) (b) That one or both spouses will make a particular disposition in a will or other governing instrument, as defined in s. 854.01 (2).

Committee Note

Updates cross reference to definition of governing instrument.

851.055 (1m) of the statutes is created to read:

851.055 (1m) Is not classified as individual property or marital property under a valid marital property agreement, unless the marital property agreement provides otherwise.

Committee Note

Recognizes that property that otherwise would be deferred marital property can be classified as individual or marital property by a marital property agreement. Typically, if the property were classified by agreement it would no longer be deferred marital property. However, the provision contemplates that a marital property agreement could

provide that property classified by the agreement would nonetheless be treated as deferred marital property at the death of a spouse.

851.21 (1) (b) of the statutes is amended to read:

851.21 (1) (b) ~~A~~ Except as provided in s. 853.32 (2) (e), a beneficiary named in any document offered for probate as the will of the decedent and includes a person named or acting as a trustee of any trust, inter vivos or testamentary, named as a beneficiary.

Committee Note

Cross reference highlights that fact that a beneficiary under a “separate statement disposing of tangible personal property” (§ 853.32) is not an interested party for purposes of giving notice under § 879.03.

851.31 of the statutes is amended to read:

851.31 Will. ~~“Will”~~ Unless the context or subject matter indicates otherwise, “will” includes a codicil and any document incorporated by reference in a testamentary document under s. 853.32 (1) or (2). “Will” does not include a copy, unless the copy has been proven as a will under s. 856.17, but “will” does include a properly executed duplicate original.

Committee Note

Clarifies that there are situations where the statute refers to wills but where nonetheless an instrument referred to in the definition should not logically be considered a will. For example, under the definition in the statute, a document incorporated by reference is considered a will. But that does not mean that the will execution formalities in § 853.03 supercede the more limited requirements in § 853.32 regarding execution of documents incorporated by reference.

The Drafting Committee considered specifically referring to each instance of conflict rather than using the admittedly general “unless the context or subject matter indicates otherwise,” but concluded that it could not identify all such situations.

851.50 of the statutes is amended to read:

851.50 Status of adopted persons. The status of adopted persons for purposes of inheritance and transfers under wills or other governing instruments, as defined in s. 854.01 (2), is governed by ss. 854.20 and 854.21.

Committee Note

Updates cross reference to definition of governing instruments.

852.01 (1) (a) 2. of the statutes is renumbered 852.01 (1) (a) 2. (intro.) and amended to read:

852.01 (1) (a) 2. (intro.) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of decedent's property other than the following property:

a. The decedent's interest in marital property.

Committee Note

Clarifies that when there are children from outside the marriage, the surviving spouse does not receive any of the decedent's interest in marital property under intestacy. Without the amendment, it can be argued that since each spouse's interest in marital property becomes "solely owned" after death, it should be considered "other than marital property" and the surviving spouse should receive half. By this (erroneous) reasoning, the surviving spouse would end up with three-fourths of the marital property. The amendment is consistent with the Appellate Court holding in *Estate of Carroll*, 244 Wis. 2d 280, 628 N.W.2d 411 (2001).

852.01 (1) (a) 2. b. of the statutes is created to read:

852.01 (1) (a) 2. b. The decedent's interest in property held equally and exclusively with the surviving spouse as tenants in common.

Committee Note

Changes the treatment of the decedent's interest in a 50-50 tenancy in common held with the surviving spouse, when that interest passes under intestacy. The amendment makes the treatment of a tenancy in common parallel to the treatment of marital property. Prior to the amendment, if the decedent and the surviving spouse were equal tenants in common, the surviving spouse would keep his or her half-interest and also receive half of the decedent's interest. This change only affects the share of the surviving spouse when there are children from outside the marriage; if there are no children outside the marriage, the surviving spouse takes the entire probate estate under § 852.01(1)(a)1.

As provided in s. Initial Applicability of the bill, this provision is effective for persons who die on or after the effective date of the legislation.

852.01 (1) (b) of the statutes is amended to read:

852.01 (1) (b) To the issue, per stirpes, the share of the estate not passing to the spouse under par. (a), or the entire estate if there is no surviving spouse. ~~If there are issue other than children, those of more remote degrees take per stirpes.~~

Committee Note

Clarifies that under intestacy all issue take per stirpes, not just issue more remote than children. Under the rule of per stirpes distribution (§ 854.04(1)), if all children are alive (or no predeceased child left any issue) then the estate will be divided equally among the children. Without this amendment, the shares of children are not specified, but equal division is assumed.

852.05 (title) of the statutes is amended to read:

852.05 (title) Status of nonmarital child born to unmarried parents for purposes of intestate succession.

852.05 (1) (intro.) of the statutes is amended to read:

852.05 (1) (intro.) A ~~nonmarital~~ child born to unmarried parents, or the child's issue ~~is entitled to take, is treated~~ in the same manner as a ~~marital~~ child by, or the issue of a child, born to married parents with respect to intestate succession from and through ~~his or her~~ the child's mother, and from and through ~~his or her~~ the child's father if any of the following applies:

852.05 (2) of the statutes is amended to read:

852.05 (2) Property of a ~~nonmarital~~ child born to unmarried parents passes in accordance with s. 852.01 except that the father or the father's kindred can inherit only if the father has been adjudicated to be the father in a paternity proceeding under ch. 767 or by final order or judgment of a court of competent jurisdiction in another state or has been determined to be the father under s. 767.62 (1) or a substantially similar law of another state.

852.05 (3) of the statutes is amended to read:

852.05 (3) (a) This section does not apply to a child who becomes a marital child by the subsequent marriage of the child's parents under s. 767.60.

(b) The status of a ~~nonmarital~~ child born to unmarried parents who is legally adopted is governed by s. 854.20.

Committee Note:

Clarifies that a "nonmarital" child is one who is born to unmarried parents.

852.12 of the statutes is amended to read:

852.12 Debts to decedent. If an heir owes a debt to the decedent, s. 854.12 governs the treatment of that debt shall be charged against the intestate share of the debtor, regardless of whether the debt has been discharged in bankruptcy. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.

Committee Note

Repeals rule regarding debt owed to the decedent by a taker under intestacy. Creates cross reference to new rule that covers debts owed to the decedent by any person receiving property from the decedent at death, irrespective of the method of transfer.

As provided in s. [Initial Applicability] of the bill, this provision is effective for persons who die on or after the effective date of the legislation.

853.03 (2) of the statutes is renumbered 853.03 (2) (am) and amended to read:

853.03 (2) (am) It must be signed by ~~2 or more witnesses, each of whom at least 2 witnesses who~~ signed within a reasonable time after ~~witnessing~~ any of the following:

1. The signing of the will as provided under sub. (1), in the conscious presence of the witness.

2. The testator's implicit or explicit acknowledgement of the testator's signature on the will, within in the conscious presence of ~~each of the witnesses~~ witness.

3. The testator's implicit or explicit acknowledgement of the will, within in the conscious presence of ~~each of the witnesses~~ witness.

853.03 (2) (bm) of the statutes is created to read:

853.03 (2) (bm) The 2 witnesses required under par. (am) may observe the signing or acknowledgement under par. (am) 1. to 3. at different times.

Committee Note

Clarifies that there is no need for the witnesses to the signing of a will to ever be in each others' presence. "Serial witnessing" satisfies the requirement of the statute.

Under the statute, each witness must witness one of the following: the signing of the will, the testator's acknowledgment of his or her signature on the will, or the testator's acknowledgment of the will. The amendment to sub . 1 clarifies that witnessing of the signing of the will, like the other acts, need only be in the "conscious presence" of the witness. Note that under § 851.035, "conscious presence" means "within the range of any of a person's senses." [emphasis added]